FILED
SEP 7 1946

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 403

MADGE CHRISTIE,

Petitioner,

against

GEORGE M. COHAN, IRVING BERLIN, DENNIS F. O'BRIEN, Executors, and KATHLEEN NOLAN HARRIS, Executrix of the Estate of SAM H. HARRIS, GEORGE S. KAUFMAN and EDNA FERBER,

Respondents.

ON APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 182

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Statement

This action is one for infringement of copyright. The plaintiff alleges that the play "Stage Door," written by the defendants Edna Ferber and George S. Kaufman, and produced on the stage by Sam H. Harris, now deceased, is an infringement upon plaintiff's copyright in her play "Thru the Looking Glass."

After trial, the District Court for the Southern District of New York (Judge CONGER) dismissed the complaint against all defendants (47 F. Supp. 39; R. 67-90). Upon appeal, the Circuit Court of Appeals for the Second Circuit

(L. HAND, SWAN and CLARK, Circuit Judges), writing *per curiam*, affirmed the judgment of the District Court (154 Fed. (2d) 827).

The issues of fact herein, of copying and material appropriation, were resolved by the District Court against the plaintiff (98-102). The District Court held that the defendant authors never had access to plaintiff's play and never copied therefrom, and that both plays were entirely dissimilar (98-99). The District Court held that there was a failure both of direct proof of access (73-74) and of indirect proof through alleged similarities between the two plays. As the District Court said:

> "I have to admit that I find no such evidence of similarities which would lead me to believe that defendants used plaintiff's play when they wrote theirs. As a matter of fact, I find more differences than resemblances, and I therefore must hold that plaintiff has failed to make out a case" (79-80).

Upon appeal to the Circuit Court, plaintiff submitted a brief almost identical with that now submitted in support of the petition for certiorari. The same set of spurious and belabored "similarities" that had been rejected by the District Court (76-79) were presented to the Circuit Court in digested version. The nature of plaintiff's claims are typified by her assertion, for example, that Edna Ferber and George S. Kaufman, two of the foremost American playwrights, experienced in dialogue and expression, resorted to her play to steal such words as " 'em," "beginning," "dump," "right away," "do you good," "this house," and "period" and extracted the evidently unique phrase "I can't take" from a sentence uttered by one character in plaintiff's play and transplanted it into an entirely different sentence in a different scene and into the mouth of a different character in "Stage Door." These absurd claims reappear in petitioner's present brief (pp. 24-29). These claims as well as other alleged claims of

similarity—in theme, characters, incidents, situations and events—which were completely rejected by the District Court, were again rejected by the Circuit Court.

The Circuit Court, after reviewing the record and reading the plays, held that a comparison of the plays did not even create a "tentative inference" of copying and that "we . . . do not find the slightest basis in them for disbelieving the authors' disclaimers." As the Circuit Court concluded:

> "In order to suppose that these two highly experienced and successful authors should have found in the plaintiff's play cues for the far-fetched similarities which she discovers, one must be obsessed, as apparently unsuccessful playwrights are commonly obsessed, with the inalterable conviction that no situation, no character, no detail of construction in their own plays can find even a remote analogue except as the result of piracy. 'Trifles light as air are to the jealous confirmations strong as proof of holy writ' " (154 Fed. (2d) 827-828).

Once again, however, plaintiff has brought forth the same set of "far fetched similarities." Her brief constitutes a presentation of the same twisted, tortured and twice rejected view of the evidence. Essential differences between the two plays are either happily ignored in plaintiff's brief, or misleading generalizations are employed to create an illusion of similarity where none in fact exists. "With this method of resolving troublesome differences, hardly any drama since the 'Garden of Eden' could survive the charge of plagiarism." (J. CLARK, in *Rose* v. *Connelly*, 38 F. Supp. 54, 56.)

We respectfully submit that plaintiff imposes upon this Court when she once again submits a fabricated analysis of the plays almost verbatim with that submitted to the Circuit Court and similar in nature to that submitted to the District Court. The defendants feel that they would

be a party to such imposition if they were once again to analyze and refute plaintiff's brief in detail.

This Court has repeatedly said that it is not the purpose of a writ of certiorari to review the evidence. Plaintiff has attempted to obtain such review under the guise that a question of "appellate procedure upon which a question of substantive law directly depends" is before this Court for determination. This alleged question is as "far fetched" as plaintiff's alleged similarities. No such question is present. The question before this Court is a simple one. Shall this Court review the evidence upon which issues of fact have previously been decided by the lower courts? This Court has repeatedly replied in the negative, and it is respectfully submitted should do so once again by denying plaintiff's petition for a writ of certiorari.

Summary of Argument

(1) That in a plagiarism action, the plaintiff must prove copying and material appropriation, both of which are issues of fact. In the instant case, both of these issues of fact were decided against the plaintiff upon more than ample evidence. (2) That the Supreme Court will not grant a writ of certiorari where only issues of fact are involved.

POINT I

In a plagiarism action, plaintiff must prove copying and material appropriation, both of which are issues of fact. In the instant case both of these issues of fact were decided against the plaintiff upon more than ample evidence.

The Circuit Court of Appeals for the Second Circuit recently again set forth the component ingredients of an action for plagiarism.

In *Heim* v. *Universal Pictures Co., Inc.*, 154 F. (2d) 480, 487 (1946), the Court said:

> "In a suit like this, plaintiff, to make out his case, must establish *two separate facts:* (a) that the alleged infringer copied from plaintiff's work, and (b) that, if copying is proved, it was so 'material' or 'substantial' as to constitute unlawful appropriation." (Emphasis ours.)

Again, in *Arnstein* v. *Porter*, 154 Fed. (2d) 464, 469 (1946), the same Court said:

> *"Each of these two issues—copying and improper appropriation—is an issue of fact.* If there is a trial, the conclusions on those issues of the trier of the facts —of the judge if he sat without a jury, or of the jury if there was a jury trial—bind this Court on appeal, provided the evidence supports those findings, regardless of whether we would ourselves have reached the same conclusions." (Emphasis ours.)

The District Court saw and heard the parties in a two-day trial and found that Ferber and Kaufman did not have access to or copy from plaintiff's play and that there had been no appropriation thereof.

The record indicates that Ferber and Kaufman had extensive experience as playwrights (478-491; 649-668); that each had received the Pulitzer Prize (481-482; 655-656); and that both had previously collaborated on plays dealing with the theatre (486-489). Both authors gave a complete and candid genesis and history of their independent conception and writing of "Stage Door" (494-500; 669-671); they told how the background of the play was based on their own personal and familiar experiences (415-416; 445-446); both denied their having seen or heard of plaintiff's script (505-506; 671-672), nor did plaintiff claim to have submitted it to them (161-162). Plaintiff's script had been submitted

to Harris in routine fashion but this submission did not result in its being read or seen by either of the authors (504, 673-674, 763-764, 781-782).

The District Court therefore said:

> "There is nothing to warrant my finding that he (Harris) ever showed the manuscript of the play to defendants Ferber and/or Kaufman" (74); and found that neither of the defendants Ferber or Kaufman ever heard of, read or had a copy of the plaintiff's play in their possession (98-99).

As for the plays themselves, the District Court said, "In the large aspect, I find the two plays entirely dissimilar" (82). A simple summary of both plays (something which plaintiff has consistently and does still refuse to set forth) will readily disclose the vast differences between them.

"Stage Door" is a finished play with a well-defined theme. The theme is the struggle of the young actress to gain a place in the theatre, and the competition of the screen to woo her away. The scene of the entire play is the Footlights Club, a sort of theatrical boarding house for young girls with stage aspirations. The heroine is Terry Randall, and the play is principally concerned with her efforts to make good. The other characters—Terry's roommate, Jean Maitland, who later becomes a "glamour girl" of the screen; Keith Burgess, the radical playwright who sells out to Hollywood; David Kingsley, the prodigal who returns to the theatre—are used to highlight and emphasize Terry's single-hearted purpose and devotion to the stage.

The trials and tribulations of the other girls at the Footlights Club—the pianist who has to play swing; Kaye who seeks the theatre as an escape from an infamous husband; Linda whose choice of "the easiest way" leads to her disfigurement for life; the world-weary Judy; the Southern belle, and all the others—are varicolored threads woven to-

gether to create a rich and teeming tapestry of the Broadway theatre.

"Stage Door" is a play about the theatre; its locale was dictated by its very theme; its dramatis personae had to be aspiring actresses and playwrights; its point would have been lost if other people or another place had been used.

It is difficult to find the theme of "Through the Looking Glass." Insofar as it can be said to have any, it is that some individuals—perhaps most—have an aptitude for messing up their lives. The fact that theatrical people were chosen to make this point is entirely fortuitous. Persons in any other walk of life might have been selected, and the basic observation would have been no less valid.

The two women—Elizabeth Thomas and Cleo Norton—whose careers are recounted to illustrate the truism, are not bright-cheeked novices of the stage, and the heartbreak they suffer is not the heartbreak implicit in the hardships and discouragements of the young. Quite the reverse. Elizabeth Thomas is an actress past her prime; she was once a star, but now is heading downgrade. Her last show was a failure. Her first marriage went on the rocks, and she lost custody of her children. Her second husband died, and the administration of his estate plunged her into vexatious litigation. Her current lover is a drunkard and a wastrel. Profoundly discouraged, she shoots her lover and commits suicide.

Cleo, too, is an established actress. She has had "extraordinary success" on the screen. She is variously described as sophisticated, selfish, neurotic, vicious and devoid of sexual restraint. She is addicted to drugs, and dies of an overdose under circumstances which suggest suicide.

At the end of the play, the tragedy of Elizabeth and Cleo is supposed to have a sobering effect on Billie-Katherine (an erstwhile stage aspirant, but now an expectant

mother) and her husband, Bob Wainwright (a "fascinating, debonair" young playwright who has been hitting the bottle and frittering away his talents on plays of no consequence), with the result that they resolve to build something finer out of their lives.

The first act is laid in the Drama Club, a hostelry for young actresses. The second act takes place in Elizabeth Thomas' living room, the third in Billie-Katherine's bedroom. The use of the Drama Club as locale is incidental; it is of no import or significance as regards the message of the play.

It is obvious that both plays are completely dissimilar. Certainly, the alleged similarities fall far short of meeting the requirements of the applicable test of comparison when proof of access is lacking. The District Court stated the test as follows:

> "Where similarities or identities are relied upon they must do more than engender suspicion of piracy, they must establish piracy with reasonable certainty" (75).

In applying the foregoing rule, the District Court said:

> "I find little in common, at least anything of substance, in the stories told by the two plays, in the motivation of the characters, in the plot, in complication nor in dramatic conflicts" (88).

The Circuit Court stated the rule in the instant case:

> "In such a setting nothing should move us to hold that the finding (of no access) was plainly wrong except a parallelism between the plays which admits of no innocent explanation."

And the Court then stated:

> "We have read them both, and do not find the slightest basis in them for disbelieving the authors' disclaimers" (154 Fed. (2d) 827).

Dismissal of the complaint was therefore based upon ample evidence and involved only issues of fact which were determined in favor of the defendants.

POINT II

Where only issues of fact are involved a writ of certiorari will be denied.

Plaintiff's petition does not fall within any of the categories set forth in the Supreme Court Rules (Rule 38 (5)b) as grounds for granting a writ of certiorari, and nowhere does plaintiff even make claim that it does.

The general purpose of the writ of certiorari is to resolve an important question of Federal law which may be in the public interest or to remove a conflict among Circuit Courts of Appeals. The writ of certiorari may not be availed of by a party who merely seeks to procure another hearing of his case.

As stated by this Court in the case of *Magnum Import Company* v. *Coty*, 262 U. S. 159, at page 163, in which petitions for writs of certiorari were denied:

> "The question how the Court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes; first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty percent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

As Justice HOLMES stated in *United States* v. *Johnston*, 268 U. S. 220, 227, 69 Lawyers Ed. 925, 45 Sup. Court 496:

"We do not grant a certiorari to review evidence and discuss specific facts."

In *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 178, 82 Lawyers Ed. 1275, 58 Sup. Court 849 (1938), the Court stated:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."

See, also, *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 68 Lawyers Ed. 413, 44 Supreme Court 163 (1923).

Conclusion

All that plaintiff is seeking by her petition for a writ of certiorari is a review of evidence upon which issues of fact have been resolved against her by the District Court and the Circuit Court of Appeals. This Court has said that such review is not the function of the writ.

Respondents therefore respectfully submit that the petition for a writ of certiorari should be denied, with costs.

Respectfully submitted,

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